

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (COMMERCIAL DIVISION, MILIMANI)

CIVIL CASE NO. 209 OF 2004

MAJESTIC PRINTING WORKS LIMITED.....PLAINTIFF

VERSUS

DINESH SHAH T/A PREPRESS PRODUCTION.....DEFENDANT

R U L I N G

In this application (by notice of motion dated 6th December, 2004) the Plaintiff/Decree-Holder seeks leave to execute the decree passed on 19th November, 2004 against the Defendant pending determination of the issue of costs. That judgment was for the admitted sum of Kshs.2,533,649.00. The judge who entered that judgment did not make an order for costs or interest thereon, save for costs of the application, which he awarded against the Defendant.

The application is brought under sections 3A and 94 of the Civil Procedure Act, Cap. 21 (the Act). Section 94 aforesaid provides:-

“94. Where the High Court considers it necessary that a decree passed in exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

The only ground for the application appearing on the face thereof is that ***“there is ample evidence that the defendant is about to wind (sic) its business under circumstances that afford reasonable probability that unless leave (as sought) is granted, then the ends of justice may be defeated.”*** There is an affidavit sworn by the managing director of the Plaintiff in support of the application. In it he depones to the facts upon which the Plaintiff’s apprehensions are based.

No grounds of opposition or replying affidavit was filed in response to the application. But at the hearing thereof I allowed the Defendant’s learned counsel to address me on any point of law. He submitted that section 94 aforesaid can be invoked only where only the issue of costs is outstanding, and that therefore, as there is an outstanding claim, the Plaintiff having claimed Kshs.4,734,840/25 in the plaint, the leave sought cannot be granted. He quoted no authority. On his part learned counsel for the Plaintiff submitted that the section is applicable to the circumstances of this case.

In my judgment I see no justification for the limitation upon section 94 aforesaid that the learned counsel for the Defendant seeks to place upon it. The only condition precedent to exercise of the discretion conferred by that section is that the decree must have been passed in the court’s exercise of its original civil jurisdiction. A “decree” as defined in section 2 of the Act may be either preliminary or final. The decree sought to be executed herein is obviously preliminary as there is an outstanding claim. I think, with respect, that the interpretation of the section by learned counsel for the Defendant is erroneous.

From the matters deponed in the supporting affidavit, which are uncontroverted, I consider that it is necessary that the preliminary decree herein passed on 18th November, 2004 be executed before settlement of the rest of the claim and the issue of costs. I will thus allow the application with costs. Order

accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF FEBRUARY, 2005.